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No. 87 1777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DAVID BARANSKI, *et al.*,

Petitioners,

v.

CHICAGO MERCANTILE EXCHANGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ANTHONY C. VALIULIS, ESQ.
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QUESTIONS PRESENTED FOR REVIEW

1. Whether, by wrongfully affirming summary judgment on facts not of record, a federal court of appeals unconstitutionally deprives litigants of their right to trial?

2. Whether, by improperly affirming summary judgment on a claim which, according to the appellate court's own determination, involves genuinely disputed issues of material fact, a federal court of appeals deprives litigants of their right to due process?

3. Whether, by wrongfully attributing to one case facts and parties found only in other, consolidated cases, a federal appellate court improperly circumvents the required standards for summary judgment?

4. Whether, by improperly affirming summary judgment in such cases, a federal appellate court so far departs from the usual and accepted course of judicial proceedings that this Court should exercise its supervisory powers by reversing the appellate court's decision?

LIST OF PARTIES

PLAINTIFFS: David Baranski; Kris Baranski; James Roth; Betty Roth; John Roth; J. Roth Builders, Inc.; The J.R. Homes, Inc. Pension Plan and Trust, by and through its Trustee, James Roth; J.R. Homes, Inc.; Vito M. Iozzo; Raymond Iozzo; Carla DeGuiseppe; Walter Ryan; Dennis Ryan; Janet Shirman; Marvin Brody; Adele Brody; Edward Weglarz; Antonina Kausas; M & I Investments; Sundancer Inc.; Elizabeth Weismehl; Deborah Weismehl; John Daher; Eugene Grandel; Marshall Silverstein; Kenneth Kraml; The Kraml Dairy, Inc., Profit Sharing Trust, by and through its Trustee, Kenneth Kraml; Glenn Scheive; Sam L. Hillman; Richard Davidson; Joanna Cazden; Dennis E. Walker; Terrance Van Driska; Earline Van Driska; Robert Fairbanks; Donna Fairbanks; Philip Roston; Paul Roston; Joseph Pallucci and Renee Pallucci; Jayar Hoag Chemical Co. Inc. Profit Sharing Plan; Jayar Hoag Chemical Co., Inc.; John R. Hoag; Julia Hoag; Martha Hoag; and Andrew Hoag.[1]

DEFENDANTS: Chicago Mercantile Exchange, First Bank of Schaumburg, K&S Commodities Inc., Morris Krumhorn, Financial Partners Ltd., and Financial Partners Brokerage.

OTHER PLAINTIFFS IN CONSOLIDATED APPEAL: Elizabeth A. Vaccariello, class plaintiff; Anthony J. Bosco; Joseph Bosco; Lawrence A. Passarella; Sandra Passarella; Joseph Gagliardo; and Josephine Gagliardo.

OTHER DEFENDANTS IN CONSOLIDATED APPEAL: Robert B. Serhant.

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[1] Pursuant to Rule 28.1 of the Supreme Court Rules, petitioners state that as to the corporations listed above there are no parent, subsidiary, or affiliated companies.

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CHICAGO MERCANTILE EXCHANGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTRODUCTORY PRAYER

Petitioners respectfully pray that a writ of certiorari issue to review and reverse the decision of the Seventh Circuit Court of Appeals which affirmed summary judgment against them and in favor of respondent Chicago Mercantile Exchange.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in the appendix and is reported as *Bosco* v. *Serhant*, 836 F.2d 271 (7th Cir. 1987). It can also be found at COMM. FUT. L. REP. (CCH) ¶ 24,006. The order of the district court entered on February 7, 1987, is set forth in the appendix, but has not been reported.

JURISDICTION

Petitioners seek review of the decision entered by the United States Court of Appeals for the Seventh Circuit on December 2, 1987. A timely petition for rehearing was denied without opinion by the Seventh Circuit on January 8, 1988. Under 28 U.S.C. § 1254(1), the Supreme Court has jurisdiction to review the appellate court's decision by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[1]

Fifth Amendment To United States Constitution, U.S.C.A. Const. Amend. 5

Rule 17.1(a) of The United States Supreme Court Rules

Rule 56(c) of The Federal Rules of Civil Procedure

Rule 536 of the Chicago Mercantile Exchange

Section 5(a)(8) of the Commodity Exchange Act, 7 U.S.C., § 5(a)(8)

STATEMENT OF THE CASE

A. Procedural Background

This action was filed by petitioners David Baranski and forty-four other plaintiffs (the "Baranski plaintiffs") for relief under (1) the Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(b); (2) the Commodity Exchange Act, 7 U.S.C. § 2 *et seq.*; (3) the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*; and (4) pendent statutory and common law. The district court's jurisdiction was based on 28 U.S.C. § 1331 (general federal question jurisdiction).

The Baranski case was consolidated with three other cases, one class action and two additional individual cases. Although the plaintiffs in all of the cases were investors with

[1] The full text for each of these can be found on pages A-21 through A-27 of the appendix.

Robert Serhant ("Serhant"), only the class and the other individual plaintiffs went to trial against Serhant. The Baranski plaintiffs did not seek or obtain a judgment against him. In addition, at trial the Baranski plaintiffs presented their own, individualized evidence with respect to their damages, evidence completely independent of and separate from the damage evidence submitted either by the class or the other plaintiffs.

All of the plaintiffs sued the Chicago Mercantile Exchange (the "Exchange")[2] under Section 5(a)(8) of the Commodity Exchange Act (the "CEA") for failing to enforce its own rules, though only the Baranski plaintiffs had claims against the Exchange based on federal securities law.

On February 7, 1986, prior to trial, the district court entered summary judgment in favor of the Exchange. (App. A-28.)[3] Under Rule 54(b) of the Federal Rules of Civil Procedure, however, the order was not appealable when entered. It did not become appealable until October 20, 1986, when all post-trial motions were denied.

On November 18, 1986, the Baranski plaintiffs filed their Notice of Appeal from, *inter alia*, the February 7 order granting summary judgment in favor of the Exchange. The Seventh Circuit's jurisdiction rested on 28 U.S.C. § 1291. On December 2, 1987, the Seventh Circuit affirmed the district court's decision. (App. A-1 to A-21.) On December 16, 1987, the Baranski plaintiffs moved for rehearing, which motion was denied on January 8, 1988. This petition followed.

B. The Seventh Circuit's Decision

Although the Seventh Circuit affirmed summary judgment in favor of the Exchange, it did so despite first finding that there were genuine issues of material fact in dispute and

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[2] The Exchange was added as a defendant on June 25, 1984.

[3] Reference to "App." are to the appendix attached to this petition.

that the plaintiffs, including the Baranski plaintiffs, had a private right of action against the Exchange under Section 5(a)(8) for failing to enforce its own Rule 536. *Bosco* v. *Serhant*, 836 F.2d 271, 276 (7th Cir. 1987) (App. A-8). The Seventh Circuit also held that there was sufficient evidence to indicate that the Exchange knew that Serhant was violating Exchange Rule 536 (836 F.2d at 278; App. A-12) and that, as a result, there was sufficient evidence to show that the Exchange had acted with the requisite "bad faith" necessary for liability:

> [I]f an exchange's regulation imposes a duty that the exchange *should* know is being flouted, the exchange is acting wrongfully—here, in an attenuated sense, perhaps, but one sufficient under the cases we have cited to demonstrate bad faith.

836 F.2d at 278; App. A-11. Indeed, the evidence in the record was enough to convince the court that "the plaintiffs appear[ed] to have a strong case [against the Exchange] under Section 5(a)(8)." 836 F.2d at 278; App. A-12.

Although the Seventh Circuit thus found that there were material facts in dispute at the time summary judgment had been entered, it nevertheless affirmed the district court's order, holding that plaintiffs' case against the Exchange, though viable, was "not one on which they can recover any [additional] damages." *Id.*

The Seventh Circuit based its decision on the principle of law that, when a group of tortfeasors inflicts one, indivisible injury, the injured party can have but one recovery. 836 F.2d at 280; App. A-16. Applying that principle to the facts of this case, the Seventh Circuit determined that, because "Serhant was the primary wrongdoer and his entire course of wrongful conduct was placed before the jury," what the jury determined as the damages attributable to Serhant represented the maximum amount that the plaintiffs could recover. 836 F.2d at 281; App. A-18. Because the plaintiffs apparently recovered more in settlements than the amount of their judgments against Serhant, the court concluded

that the plaintiffs would not be able to recover any damages against the Exchange, even though they appeared to have a good case against it.

By applying this reasoning to the Baranski plaintiffs' case, the Seventh Circuit failed to recognize that the Baranski plaintiffs did not go to trial against Serhant and thus did not obtain a judgment against him in any amount.[4] Accordingly, as to the Baranski plaintiffs, the jury did not determine the maximum amount that they, the Baranski plaintiffs, are able to recover.

Unlike the class and the other individual plaintiffs, after Serhant filed for bankruptcy the Baranski plaintiffs decided not to lift the automatic stay or proceed against him in the district court case. Thus, even under the Seventh Circuit's reasoning, the Baranski plaintiffs should have been allowed to proceed against the Exchange because the amount of their settlements did not exceed the total amount of their damages.

As a result of the fraud, the Baranski plaintiffs lost $2,500,000, which is in fact the maximum amount of compensatory damages that the Baranski plaintiffs can recover. From their settlements with defendants, however, the Baranski plaintiffs have received only $1,300,000. Thus, the Baranski plaintiffs' still have not recovered $1,200,000. For at least this amount, therefore, the Exchange remains potentially liable.

To bring this point to the attention of the Seventh Circuit, the Baranski plaintiffs filed a petition for rehearing. The Seventh Circuit denied the petition without comment.

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[4] The Baranski plaintiffs went to trial only against defendants Morris Krumhorn, K & S Commodities Inc., Financial Partners Ltd., and Financial Partners Brokerage Ltd.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Our judicial system cannot guarantee justice. It can and should, however, guarantee that when a party seeks justice, it will be heard and have its case decided on the facts—and only those facts—in the record. The Fifth Amendment's assurance of due process of law requires at least that. U.S.C.A. Const. Amend. 5; *see, for example, Estes* v. *Texas*, 381 U.S. 532, 543 (1965). Unfortunately, that is exactly what the Seventh Circuit did not provide in this case. Instead, the Seventh Circuit arbitrarily took away from petitioners their right to trial and did so by totally ignoring fundamental principles of summary judgment and consolidation.

Applying to petitioners an alleged "fact" (*i.e.*, that the total amount of damages had been determined) not found at all in petitioners' case but solely in other, distinct though consolidated cases, the Seventh Circuit completely overstepped the boundaries of accepted judicial procedure. It is for this reason, and to ensure that the rights of future litigants will not be similarly treated, that the Baranski plaintiffs have filed this petition.

A. By Ignoring Fundamental Principles of Summary Judgment and Consolidation, the Seventh Circuit Completely Overstepped the Boundaries of Accepted Judicial Procedure.

1. The Seventh Circuit Did Not Have Any Discretionary Right to Ignore Accepted Standards Regarding Summary Judgment Simply Because the Baranski Plaintiffs' Case Had Been Consolidated With Other Cases.

A federal court of appeals simply has no right to affirm summary judgment by applying to one case a collateral fact found outside the record of that case. *Securities Industry Association* v. *Board of Governors*, 807 F.2d 1052, 1061 n.1

(D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3228 (1987) (summary judgment based on extraneous facts improper). *See generally* F.R.C.P. 56(c); *Tippens* v. *Celotex Corp.*, 805 F.2d 949 (11th Cir. 1986); *Daniels* v. *Morris*, 746 F.2d 271, 276 (5th Cir. 1984).

Moreover, even if the collateral fact were found in the record of a consolidated case, summary judgment would still be improper. As set forth by this Court:

> [C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.

Johnson v. *Manhattan Railway Co.*, 289 U.S. 479, 496-97 (1933) (citations omitted). *Accord Estate of Lidbury* v. *Commissioner of Internal Revenue*, 800 F.2d 649, 655 (7th Cir. 1986); *United States* v. *Altman*, 750 F.2d 684, 695-96 (8th Cir. 1984); *McKenzie* v. *United States*, 678 F.2d 571, 574 (5th Cir. 1982); *Kraft, Inc.* v. *Local Union 327*, 683 F.2d 131, 133 (6th Cir. 1982); *J.G. Link & Co.* v. *Continental Casualty Co.*, 470 F.2d 1133, 1138 (9th Cir. 1972), *cert. denied*, 414 U.S. 829 (1973). *See also Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285, 293 (1892) (consolidated actions remain distinct and require separate verdicts and judgments).

Petitioners are unaware of *any* authority which would permit a court to affirm summary judgment by attributing to the subject case facts exclusively of record in a different case with which the subject case has merely been consolidated. Despite the absence of such authority, this is exactly what the Seventh Circuit did here. It applied to the Baranski plaintiffs' case a "fact" found exclusively in the record of the other consolidated cases.

Only as to the class and the other individual plaintiffs could it be said that the jury determined the amount of the damages caused by Serhant. That determination was not

and indeed could not have been made with respect to the Baranski plaintiffs, because the Baranski plaintiffs did not proceed against Serhant at trial. Thus, there was no final determination of the total amount of the Baranski plaintiffs' damages that resulted from Serhant's fraud. For that reason, the Baranski plaintiffs' claim against the Exchange is one on which they can still recover damages.

Contrary to the teachings of *Johnson* v. *Manhattan Railway* and it progeny, the Seventh Circuit here not only disregarded the fact that the Baranski plaintiffs did not sue Serhant but also ignored the separate proof of damages put on by the Baranski plaintiffs. In so doing, the Court of Appeals destroyed the independent status of the Baranski plaintiffs' case, thereby depriving the Baranski plaintiffs of their constitutional right to be heard on the merits of their individual claims against the Exchange.

2. The Seventh Circuit Did Not Have Discretionary Power to Affirm Summary Judgment Once it Found that the Baranski Plaintiffs' Claim Involved Genuine Issues of Material Fact.

As established by the plain language of Rule 56(c) of the Federal Rules of Civil Procedure and cases interpreting that rule, discretion plays no role in a court's decision regarding summary judgment. As recently reaffirmed by this Court, if a claim involves a genuinely disputed issue of material fact, a court can neither grant nor uphold summary judgment. *O'Connor* v. *Ortega*, 107 S. Ct. 1492 (1987); *Anderson* v. *Liberty Lobby*, Inc., 477 U.S. 242 (1986). *Accord Associated Press* v. *United States*, 326 U.S. 1, 6 (1945) ("Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of fact between them"); *Mintz* v. *Mathers Fund, Inc.*, 463 F.2d 495, 498 (7th Cir. 1972). *See generally* 6 J. MOORE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 56.15[6] (2d ed. 1987).

Here, the Seventh Circuit itself determined that there was sufficient evidence to indicate that the Exchange knew that Serhant was violating Exchange Rule 536 and that the Exchange had acted with the requisite "bad faith" necessary to be liable. Indeed, the evidence in the record was enough to lead the court to conclude that "the plaintiffs appear[ed] to have a strong case [against the Exchange] under Section 5(a)(8)." *Bosco* v. *Serhant*, 836 F.2d 271, 278 (7th Cir. 1987); App. A-12. That being the case, the court had no discretion to deprive the Baranski plaintiffs of their right to a trial on the merits.

B. The Seventh Circuit's Decision Could Be Used to Abridge Substantive Rights in a Virtually Limitless Array of Cases.

Clearly, the Seventh Circuit's decision flouts established procedure governing summary judgment and the consolidation of cases. If left standing, the decision could stimulate similar departures by other courts confronted with these significant, and recurring, procedural issues. Accordingly, this is precisely the type of case which this Court should review in order to preserve uniformity in federal procedure. *See* Rule 17.1(a) of the Supreme Court Rules. *See generally Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973) (certiorari granted to clarify application of amount-in-controversy requirement in class actions); *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965) (certiorari granted "[b]ecause of the threat to the goal of uniformity of federal procedure posed by the decision below"); *Hickman* v. *Taylor*, 329 U.S. 495 (1947) (certiorari granted to define scope of evidentiary protection given work product in discovery).

Moreover, and more importantly, this case affects much more than uniform federal procedure. As discussed above, the Seventh Circuit's misapplication of established procedural rules cost the Baranski plaintiffs their right to trial. A loss of a more vital substantive due process right does not exist. *See Estes* v. *Texas*, 381 U.S. 532, 543 (1965) ("a fair

trial in a fair tribunal is a basic requirement of due process"): *N.L.R.B.* v. *Cincinnati Bronze Inc.*, 829 F.2d 585 (6th Cir. 1987) (civil litigant also entitled to due process of law). If, as the Seventh Circuit has done here, a court is permitted to apply facts not in the record before it in order to justify a decision that it is without discretion to make, our entire system of justice is undermined.

If this decision is left standing, other courts may use it as precedent to deprive future litigants of their right to trial for reasons not of record. Another court, for example, might take away a party's right to trial because that court believes it will be impossible to collect a money judgment against the defendant. Or perhaps some other court will use some other basis, not in the record before it, to deprive a litigant of the right to trial in a case in which genuinely disputed facts are admittedly at issue.

By improperly affirming the district court's grant of summary judgment, the Seventh Circuit in essence "refused to adjudicate a case . . . on grounds having no warrant in the law." *Thermtron Products Inc.* v. *Hermansdorfer*, 433 U.S. 336, 352 (1976) (writ of mandamus). To rectify this error and to ensure that the right of all litigants to fundamental due process is not jeopardized, this Court should, as it did in *Thermtron*, require the Seventh Circuit to reinstate the Baranski plaintiffs' case against the Exchange and remand it to the district court for trial on the merits.

CONCLUSION

For the foregoing reasons, this Court should grant the Baranski plaintiffs' petition.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 86-2918, 86-2926, 86-2936,
86-2937, 86-3006, 86-3008, 86-3064

ANTHONY J. BOSCO, et al.,

Plaintiffs-Appellants,

v.

ROBERT B. SERHANT, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 83 C 7841, 84 C 527, 82 C 5910, 82 C 6611
George N. Leighton, *Judge.*

ARGUED SEPTEMBER 11, 1987—DECIDED DECEMBER 2, 1987

Before WOOD, JR. and POSNER, *Circuit Judges,* and GRANT, *Senior District Judge.**

POSNER, *Circuit Judge.* This unwieldy commodities-fraud case, rich in parties and issues, comes to us after a five-week trial that produced a record of several thousand pages. However, the essential facts are simple (and we shall make them even simpler, to the extent this can be done without distorting our analysis), and many of the issues require little or even no discussion.

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* Hon. Robert A. Grant, of the Northern District of Indiana, sitting by designation.

At the heart of the fraud was Robert Serhant, who between 1980 and 1982 offered investors a "Hedge-Spread Program" that he said would work as follows. For every $100,000 invested, Serhant would use $97,000 to buy a 90-day U.S. Treasury bill having a value at maturity of approximately $100,000 (this was a period of high interest rates) and would invest the remaining $3,000 in Treasury bill futures traded on the Chicago Mercantile Exchange, of which he was a member. He told investors that their risk would essentially be limited to the interest on the Treasury bill, because, at worst, at the end of 90 days they would have $100,000 (more or less)—the $97,000 principal of the Treasury bill plus interest thereon for 90 days. They would have lost only the interest they would have earned if the full $100,000, rather than $97,000, had been invested in Treasury bills. The "Program" was a gimmick, of course; the investors would be no better off than if they gave Serhant just $3,000 each. And it was misleading, as we shall see, to suggest that an investor could lose no more than the amount of the investment used to buy futures.

To do the actual trading of the futures Serhant needed the services of both a clearing member of the Exchange, whose function is to guarantee that each party to a trade will make good on his commitment, and a futures commission merchant, who acts as custodian of the investors' funds. (On the mechanics of commodities trading, and especially the role of the clearing member, see *United States v. Dial*, 757 F.2d 163, 164-66 (7th Cir. 1985); *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 181 (7th Cir. 1984); *Leist v. Simplot*, 638 F.2d 283, 286-88 (2d Cir. 1980), aff'd under the name of *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982); Fishman, *Commodities Futures: An Introduction for Lawyers*, 65 Chi. Bar Record 306, 309 (1984); Chicago Board of Trade, Commodity Trading Manual (1982).) For most of the period of the fraud, Serhant used K & S Commodities, Inc. (owned by Messrs. Schiller and Krumhorn) as both his clearing agent and futures commission merchant.

Serhant's scheme was fraudulent in three respects. First, he invested not 3 percent but almost 100 percent of the investors' money in Treasury bill futures, thus making the investments far riskier than the investors had originally supposed they would be. Erroneously predicting trends in short-term interest rates, Serhant lost $21 million of the $51 million invested in the Hedge-Spread Program. He didn't pocket the money; he just lost it in trading.

Second, he tried to conceal the losses from the investors by various dishonest tricks such as "allocating" profits to investors who had suffered losses. Suppose Serhant made a "block" sale (that is, a consolidated sale of futures contracts held in different accounts, see *United States v. Dial*, *supra*, 757 F.2d at 165, in this case accounts of different customers) of two futures contracts, at a price of $2 a contract. And suppose that he had paid $3 for one of the contracts and $1 for the other and that the first contract had been bought for the account of an investor who had later suffered large losses and the second contract for the account of a new investor, who had suffered no losses; Serhant might switch the accounts so that the account of the first investor would show a profit (of $1) that offset some of that investor's losses. As in a Ponzi scheme, Serhant was using newly invested money to make old investors think they were earning profits rather than losing their shirts.

Third, Serhant exaggerated the degree to which the Hedge-Spread Program, had it been implemented as represented, was secure. In commodities trading you can lose more money than you invest, even if you ignore margin calls. A futures contract is a contract to buy or sell a commodity or a financial instrument at a specified price on a specified date, and should an investor be unsuccessful in unloading the contract as the price shifts against him (he might be unsuccessful because the price changed precipitately or simply because his broker failed to offset the contract), he may end up having to ante up more than he invested.

For these various frauds Serhant is now serving an 11-year prison sentence.

The investors whom he fleeced brought this civil suit (actually suits, but we'll suppress that irrelevant detail to simplify the opinion) against a variety of individuals and institutions. Many of the defendants settled before trial, to the tune of more than $8 million. Some did not settle—Serhant, and companies owned by him which he used as vehicles for the fraudulent scheme; K & S, and one of its co-owners, Krumhorn; the Chicago Mercantile Exchange; and the First Bank of Schaumburg. The district court granted summary judgment for the exchange and for the bank but allowed the case to go to the jury against the other defendants, which is to say against the Serhant and K & S groupings. The jury, asked to assess compensatory damages separately against each defendant, returned a verdict that awarded total damages—after some trebling under RICO, see 18 U.S.C. § 1964(c), which Serhant and his companies were held to have violated—of about $3.3 million. Most of the assessment is against the Serhant group of defendants. Only $120,001 was assessed against K & S and $60,001 against Krumhorn. Schiller, the co-owner of K & S, had settled before trial for $350,000.

The plaintiffs appeal from the judgment in favor of the exchange and the bank, and from the district court's refusal to set aside the damage judgment against the other defendants as being too low. Those defendants cross-appeal, contending that they should have had judgment in their favor. We discuss the liability of the Mercantile Exchange first, then the adequacy of the damages judgment, then the liability of K & S and Krumhorn and the bearing of the settlements generally, and last the liability of the First Bank of Schaumburg. There are a few other issues worthy of some discussion and we'll tuck them in at convenient places.

The plaintiffs seek to rope in the Exchange under either of two sections of the Commodity Exchange Act. Section 5a(8), 7 U.S.C. § 7a(8), as it read in the period relevant

to this case, required each exchange to "enforce all bylaws, rules, regulations, and resolutions, made or issued by it . . . , which relate to terms and conditions in contracts of sale . . . , and which have been approved by the [Commodity Futures Trading] Commission . . . ." Section 13c(a), 7 U.S.C. § 13c(a), provided that "any person who . . . willfully aids, abets, counsels, . . . [etc.] a violation of any of the provisions of this [Act] . . . may be held responsible in administrative proceedings under this [Act] for such violation as a principal." The Act nowhere expressly authorized private damages suits against violators of either section. The Futures Trading Act of 1982 changed this, see 7 U.S.C. § 25(b)(1)(A); 7 U.S.C. § 13c(a), but the parties agree that the changes are inapplicable to this case. Proceeding under the unamended statute, the district court held that a private right of action is implicit in section 13c(a) (aiding and abetting) but not in section 5a(8) (failure to enforce rules), and so dismissed the section 5a(8) claim. Then he granted summary judgment for the defendants on the aiding and abetting claim, on the ground that there was insufficient evidence to create a triable issue.

The whole question of "implied" rights of action is deeply vexed. It lies at the crux of a series of debates over statutory interpretation. Those judges who believe that most statutes are compromises between rival interest groups hesitate to create implied rights of action no matter how defective a statute's remedial scheme is without them, for they believe that in all likelihood the absence of effective remedies was a part of the compromise that enabled the statute to be passed, and they rightly do not want to undo the compromise. Those who believe that a regulatory statute should be viewed not as the point of balance between conflicting interest groups but as a straightforward effort to eliminate abuses do not hesitate to enforce a statute by whatever remedies are expedient.

Some take a different view; they believe that the question is not whether the statute's ostensible purposes would be served by adding a private right of action to the rem-

edies expressly provided, but whether Congress consciously intended (without bothering to say) that there should be a private right of action. The Supreme Court followed this approach in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982), and held that there is an implied right of action under the provisions of the Commodity Exchange Act that are designed to prevent fraud. Just as in this case, one of the provisions was section 5a(8). Curran had alleged that a rule of a commodity exchange designed to prevent price manipulations had not been enforced. The Court reasoned that because in 1974, when Congress expanded the Act's remedial provisions (although without creating a private right of action under section 5a(8)), courts were freely implying rights of action and had even done so in a number of commodities cases, and because Congress must be presumed to know the decisional background against which it amends its statutes, it must have wanted the courts to keep on implying private rights of action in the same class of cases; otherwise it would have told them to stop. See *id.* at 377-82. There is more to the majority opinion than this, but this is the heart.

As an original matter we might question the last two links in this chain. They might be thought to impute to Congress greater knowledge of case law than is realistic to suppose it has, to underestimate the degree to which Congress is content to avoid deciding questions (such as the question whether courts should have continued implying private rights of action in the Commodity Exchange Act notwithstanding the strengthening of the public remedies by the 1974 amendments), and to equate legislative inaction to action.

More pertinent than these reservations is the fact that some courts, including our own, have, while following *Curran*'s general approach, declined to imply a right of action against violators of provisions of the Commodity Exchange Act relating to disputes over membership in exchanges and disputes over exchanges' failing to alter the terms of their futures contracts in ways that might benefit

investors. See, e.g., *Cardoza v. CFTC*, 768 F.2d 1542, 1554-57 (7th Cir. 1985); *Sam Wong & Son, Inc. v. New York Mercantile Exchange*, 735 F.2d 653, 666-70 (2d Cir. 1984) (Friendly, J.). Central to these decisions is the proposition that because such disputes had not been the subject of private damages actions before 1974, Congress could not be presumed to have wanted to authorize such actions as a means of resolving them.

This may be slicing the cake too thin. The point emphasized in *Curran* was not that courts had entertained private suits to enforce specific provisions of the Commodity Exchange Act before 1974, though this was mentioned, but that courts in that era were liberal in implying private rights of action in remedial statutes generally. A stronger defense of *Cardoza* and *Sam Wong* is that in the circumstances of those cases a private right of action would not have been an expedient adjunct to the statute's remedial system. Membership disputes, for example, are traditionally and on the whole satisfactorily handled by arbitration, while as Judge Friendly pointed out in *Sam Wong* to allow a trader to bring a suit just because he could imagine a change in the terms of a futures contract that might have averted a loss could flood the courts with litigation unmanageable in its speculativeness. See 735 F.2d at 669.

In the case of a massive multi-million dollar fraud facilitated by an exchange's failure to enforce rules designed to prevent fraud, it can be argued that the remedies provided by the Act are inadequate and that that is why Congress amended the Act in 1982 to make the right to sue an exchange guilty of such failures explicit. Since we are proceeding under the Act as it stood before 1982, Congress's intentions in 1982 are relevant only insofar as they cast light on the understanding of the earlier Congresses that created the Act in the form in which it existed at that time. They cast this much light: Congress did not believe in 1982 (or at least did not say) that it was changing course and revising an earlier compromise that had ruled out effective remedies for violations of the Act.

The present case is too much like *Curran* to be easily distinguished. The fact that the cases decided before 1974 did not involve any violations of exchange rules designed to prevent fraud as such, but only violations of rules designed to prevent price manipulation, is immaterial, for some of the cases involved violation of the *statutory* prohibition against fraud, and anyway price manipulation is a species of fraud. Although *Curran* jostles uneasily with other, and apparently still authoritative, statements of the principles governing implied rights of actions, see, e.g., *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Mercantile Exchange concedes that if the plaintiffs can fit themselves within the principles of *Curran* they have an implied right of action.

Even if the district judge erred in dismissing the plaintiffs' section 5a(8) claim at the threshold, however, the error would be harmless if as the Exchange argues there was not enough evidence to create a triable issue with regard to its alleged failure to enforce its rules.

The express private right, created in 1982, to sue an exchange for failing to enforce rules that it is required to enforce is limited to situations where the exchange's failure is in "bad faith." 7 U.S.C. § 25(b)(4). In so limiting the right Congress was merely codifying what had become the settled understanding of the scope of the implied right of action recognized in *Curran* and other cases. *Brawer v. Options Clearing Corp.*, 807 F.2d 297, 302 (2d Cir. 1986); *Sam Wong & Son, Inc. v. New York Mercantile Exchange*, *supra*, 735 F.2d at 676 n. 30. By "bad faith," however, the cases did not mean actual participation in fraud (or other misconduct), for such conduct would make the exchange liable directly under section 4b, 7 U.S.C. § 6b, the anti-fraud section. Yet, read naturally, the words seem to imply that the exchange's failure to enforce must be more than merely negligent. How much more? In ordinary English "bad faith" implies a deliberate wrong rather than just failing to come up to an objective standard of care, which is what negligence is. Therefore, as an original matter (an important qualification, as

will appear) we might conclude that the plaintiffs in this case would have to prove that the Mercantile Exchange knew that a rule it was required to enforce was being violated, or—what is in fact a form of knowledge—deliberately closed its eyes so that it would not discover what it strongly suspected was going on. This is the form of reckless disregard that we discussed recently in the context of prison officials' liability for failing to protect prisoners from dangers to their health or safety. See *Duckworth v. Franzen*, 780 F.2d 645, 651-56 (7th Cir. 1985); cf. *United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir. 1986); *United States v. Josefik*, 753 F.2d 585, 589 (7th Cir. 1985).

The Mercantile Exchange's Rule 536 requires that "at the time of execution [of an order], every order received from a customer . . . must be in writing, *with the customer's designation indicated.*" One purpose of the language we have italicized is to prevent what we earlier called "allocation"—an integral part of Serhant's fraud. When a member of the Exchange wants to make a trade, he must transmit his order to the floor. This is usually done by phone to save time. The floor broker writes down the order dictated over the phone, then steps away from the phone booth and, by means of hand signals, transmits the order to the "pit," where it is executed. He then makes a note of the transaction, which is later posted to the customer's account with the futures commission merchant. Often Serhant would be placing a block order on behalf of a number of investors in his Hedge-Spread Program. Each investor had a customer designation (a number), which Serhant could have dictated over the phone to the floor broker; but he refused to do this, on the ground that it was too time-consuming and that recording the customer designations when the memo of the transaction came back from the floor satisfied the rule. An officer of K & S disagreed and complained to the Exchange. At a conference where she and Serhant argued their opposing points of view, the Exchange's representative agreed that it would be too much of a burden on Serhant

to require him to dictate the customer designations to the floor broker. Later the Exchange conducted an audit of Serhant's records to make sure that the customer designations appeared on the office copies of the floor brokers' memos of transactions; they did.

So the Exchange knew that Serhant was not dictating customer designations to the floor broker, but the anterior question, on which liability under section 5a(8) depends, is whether in failing to do this Serhant was violating Rule 536. Although read literally the rule requires that the customer designation be on the order at the moment of execution, the Exchange interpreted the rule as requiring merely that the designation appear on it within a reasonable time after execution. Is this a permissible interpretation? There is a danger that if the order is executed before the customer designation is placed on it, the customer's representative (Serhant) will bide his time and not place the designation on the order when it comes back to his office until he knows how each customer is doing and can shuffle designations around as may be necessary to conceal losses. In fact this is what happened. But the issue presented to the Exchange was not whether Serhant was likely to play any such games but whether the customer designation could be affixed to the floor order immediately after rather than immediately before execution. Concerned with the delay that would be created if the designations had to be on the floor order before it was executed, the Exchange decided that Serhant could wait till right after the order was executed. Even if this interpretation of Rule 536 was incorrect or even unreasonable, it would not be in bad faith under the demanding standard suggested. Cf. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126-27 (1985).

Now in fact Serhant often waited much longer than this to put on the customer designations, and therefore he was violating the rule even as interpreted by the Exchange. The Exchange argues that there is no evidence either that it knew this or that it went out of its way to avoid knowing because it was fearful of discovering something it

would rather not know. It argues, in short, that it acted in good faith. But this argument works only if "bad faith" in the 1982 amendments, and (what is more germane to this case, which arises under the earlier statute) in the case law that the amendments codified, has the same meaning it bears in ordinary English. The law does not always use the words "bad faith" in their ordinary-language sense, see, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); 1 Anderson on the Uniform Commercial Code § 1-201:86 (3d ed. 1981), and, in the present setting, involving an exchange's failure to enforce its rule in accordance with the exchange's own interpretation, the courts, including our own, have treated the term "bad faith" as if it read "negligence." See *Hochfelder v. Midwest Stock Exchange*, 503 F.2d 364, 368 n. 2 (7th Cir. 1974), a case involving the duty of self-regulation under the Securities Exchange Act rather than the Commodity Exchange Act but not distinguishable on any principled ground; also *Rich v. New York Stock Exchange*, 522 F.2d 153, 155 n. 4 (2d Cir. 1975).

Thus, if an exchange's regulation imposes a duty that the exchange *should* know is being flouted, the exchange is acting wrongfully—in an attenuated sense, perhaps, but one sufficient under the cases we have cited to demonstrate bad faith. The test is different if the exchange injures a trader through the exercise of a discretionary power, such as the power to take emergency actions to prevent substantial losses; then more must be shown to constitute bad faith—either that the exchange acted unreasonably or that it had an improper motivation. See *Sam Wong & Son, Inc. v. New York Mercantile Exchange*, *supra*, 735 F.2d at 670-78; *Daniel v. Board of Trade of City of Chicago*, 164 F.2d 815, 819 (7th Cir. 1947). Discretion implies latitude for judgment, and commodity exchanges must not be deterred from exercising judgment by the prospect of heavy liability if they make a mistake.

Thus in the present case, if the alleged bad faith were just the Mercantile Exchange's interpreting its rule to allow Serhant to place customer designations on orders shortly

after rather than before or at the moment of execution, the higher standard for proving bad faith would be applicable. Interpretation is often, and was here, discretionary, cf. *Homemakers North Shore, Inc. v. Bowen*, No. 87-1389, slip op. at 7-8 (7th Cir. Oct. 22, 1987); and the Exchange's interpretation, while somewhat free, was not unreasonable, and there is no evidence of improper motivation. But with regard to Serhant's violations of Rule 536 (as interpreted by the Exchange), there was no scope for the exercise of discretion and hence no excuse (under the cases) for the Exchange's carelessness in ignoring evidence that such violations were being committed. Furthermore, despite the audit there is some evidence that the Exchange knew that Serhant was delaying up to six hours in placing customer designations on the order form—a delay too long for the Exchange to deem him in compliance with its regulation, even when the regulation is interpreted to allow reasonable delay.

So the plaintiffs appear to have a strong case under section 5a(8)—though not one on which they can recover any damages from the Mercantile Exchange in this case, as we shall see later on.

The plaintiffs' case for aiding and abetting is weak. To begin with, the language of section 13c(a) appears to exclude a private right of action for aiding and abetting, by stating that "any person who . . . aids, abets, . . . [etc.] . . . *may be held responsible in administrative proceedings.*" (Emphasis added.) The statute seems not merely to create a right and specify a remedy for it but to define the right in terms of a remedy—to create a right to an administrative remedy rather than a free-standing right to which courts may attach such remedies as seem necessary and proper to assure reasonable compliance with the statute. Moreover, the legislative history of the 1982 amendment to section 13c(a), though scanty, does indicate that Congress thought it was changing the law rather than confirming the judicial interpretation of the existing statute. See H. Rep. No. 565, 97th Cong., 2d Sess. 104 (1982) ("At present, the provision [section 13c(a)] is applicable only to administrative proceedings under the

Act"). This is some evidence regarding the scope of the prior law. Although, surprisingly, the question whether section 13c(a) was enforceable by an implied right of action before the 1982 amendment has never before risen to the appellate level, the district courts that have considered the question have unanimously answered "no"—until this case. See *Strax v. Commodity Exchange, Inc.*, 524 F. Supp. 936, 944 (S.D.N.Y. 1981); *Johnson v. Chilcott*, 590 F. Supp. 204, 206 (D. Colo. 1984); *Bennett v. E.F. Hutton Co.*, 597 F. Supp. 1547, 1552-54 (N.D. Ohio 1984); *Evanston Bank v. Conticommodity Services, Inc.*, 623 F. Supp. 1014, 1022-23 (N.D. Ill. 1985).

We are puzzled why Judge Leighton thought there was a private right of action under section 13c(a) but not under section 5a(8). But even if there is such a right under section 13c(a), as we greatly doubt, the evidence that was before him when he ruled on the defendants' motions for summary judgment did not create a triable issue; summary judgment should have been granted. Aiding and abetting in the criminal law requires not only knowledge of the principal's objective but a desire to help him attain it. See, e.g., *United States v. Ambrose*, 740 F.2d 505, 509 (7th Cir. 1984); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.). There is no evidence of such knowledge and desire here; indeed it would be most unlikely for the Exchange to *want* to help a Serhant defraud his customers, for scandals such as the Serhant frauds can only hurt the Exchange. The plaintiffs argue that civil aiding and abetting requires less proof of participation in the principal's scheme than criminal aiding and abetting, but they present no authority to support this argument and they overlook a ruling by the CFTC interpreting section 13c(a) to adopt the criminal standard of aiding and abetting. *In re Richardson Securities, Inc.*, CCH Comm. Fut. L. Rep. ¶ 21,145, at pp. 24,642-24,646 (CFTC Jan. 27, 1981). As the Commission explained there, the legislative history of section 13c(a) shows that the aiding and abetting provision was modeled on, and was intended to be interpreted consistently with, the federal statute that makes aiding and abetting a crime, 18 U.S.C. § 2.

We move to the question whether the damage award was so inadequate (perhaps because of errors in instructions or trial rulings) that the plaintiffs are entitled to a new trial. The plaintiffs point out that they indisputably lost $7 million during the period when K & S (a principal defendant in the part of the case that went to the jury) was handling Serhant's trades, and they say the jury was irrational in awarding so much less. They wax especially wroth over the award to Judge Bosco (one of the plaintiffs) of a mere $1 in damages, though the evidence that he lost many thousands of dollars is undisputed. And they complain that the district court, in remarking to the jury that the confirmations that the plaintiffs received from K & S were "in plain English," made the jury think that the plaintiffs were the authors of their own losses.

It is not hard to reconstruct the jury's thinking. In arguing to the jury, the defendants' able lawyers harped on the theme that the plaintiffs are affluent, knowledgeable persons—judges, businessmen, lawyers, even a CPA and a broker on the Chicago Mercantile Exchange—who if they had read the extensive mailings from K & S would have realized, and probably did realize despite their denials, that Serhant was putting most of their investments into Treasury bill futures. When a confirmation states that the recipient has just bought "T-bill Sept." for $88, it is plain that he has bought a futures contract rather than a Treasury bill, which is not sold in such small denominations. Granted, contributory negligence is not a defense to fraud, *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1562 (7th Cir. 1987), the main charge on which the case went to the jury. But the defendants' argument is not that the plaintiffs were guilty of contributory negligence but that they knew Serhant was deviating from the terms of the Hedge-Spread Program and ratified his deviation. If so, the plaintiffs were the authors of their own losses.

These were trading losses. Serhant did not pocket any of the plaintiffs' money; on the contrary, he lost hundreds of thousands of his own dollars. Apparently the jury believed that the plaintiffs, trusting in Serhant's investment

genius (as they thought it), consented to his using as much of their money to buy Treasury bill futures as he saw fit. This is not the whole story, because by using the dishonest device of "allocation" to conceal losses Serhant may have caused some of the plaintiffs to stick by him longer than they would have done if they had known the truth, and, in sticking by him longer, to lose more money. Maybe this is why the jury did award some damages, though much less than the plaintiffs had sought.

The jury heard the plaintiffs testify and read the confirmation notices and it was therefore in a good position to determine whether, and approximately how much of, the losses were due to the plaintiffs' willingness to assume the greater risk that Serhant imposed on them when he put more of their money into Treasury bills than he had said he would. The verdict is harsh, and may well be wrong in imputing to the plaintiffs an intelligent interest in their financial affairs, but as it is not irrational it must stand. The alleged trial errors are trivial, consisting as they mainly do of a few comments by the judge in the course of a long trial, and of unimportant details in the instructions. It is most unlikely that the alleged errors affected the verdict. Jurors, especially in a long trial, acquire confidence about their knowledge and ability to decide the case and are not easily swayed by the judge's infrequent comments on particular bits of evidence, or by the minutiae of jury instructions rarely drafted with an eye to maximum intelligibility.

The next issue is the liability of K & S and Krumhorn, challenged by these parties' cross-appeal. The jury exonerated them of the charge of fraud but found them liable for having breached a fiduciary duty to their customers, the investors in the Hedge-Spread Program. The first finding moots the argument that the judge should not have dismissed the charge that K & S and Krumhorn violated Rule 10b-5 of the Securities Exchange Commission. Rule 10b-5 is applicable to this case, even though it is a commodities case, because limited partnerships are securities, *Rodeo v. Gillman*, 787 F.2d 1175, 1177-78 (7th Cir. 1986); but it requires proof of fraud.

We greatly doubt whether K & S—and its co-owner, Krumhorn, who had no personal dealings with any of the plaintiffs—could be liable under either the Commodity Exchange Act or state law (if not preempted, another issue we need not decide) to customers of K & S for failing to communicate its suspicions of Serhant to them, merely in virtue of K & S's status as a clearing member. The clearing member's job is to make sure that trades go through, rather than to prevent misrepresentations by the member whose trades it is guaranteeing. But K & S was also Serhant's futures commission merchant and in this capacity designated one of Serhant's companies as an agent to assist it in trading for the accounts of the investors in the Hedge-Spread Program. Section 2(a)(1) of the Commodity Exchange Act, 7 U.S.C. § 4, discussed in *Rosenthal & Co. v. CFTC*, 802 F.2d 963 (7th Cir. 1986), imputes liability for an agent's violations of the Act to the agent's principal (i.e., to K & S), consistently with usual notions of respondeat superior. Another provision of the Act, section 13(c), 7 U.S.C. § 13c(c), also discussed in *Rosenthal*, see 802 F.2d at 966-67, imputes liability to "controlling persons" (that is, persons controlling the violator) as well, i.e., to Krumhorn and Schiller.

However, the $350,000 settlement that Schiller made with the plaintiffs wipes out any liability of K & S and Krumhorn and, as we shall see, most of the liability of the other defendants as well.

A tort victim can obtain only one recovery for his harm, no matter how many tortfeasors inflicted it. E.g., *Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc.*, 722 F.2d 1319, 1324 (7th Cir. 1983); Prosser and Keeton on the Law of Torts § 48 (5th ed. 1984). This principle is seen most clearly in cases where a group of tortfeasors inflicts an indivisible harm, as for example where one tortfeasor places a bucket under the plaintiff's chair, another fills it with gasoline, and a third drops a match into it, causing it to explode and injure the plaintiff. Because the injury is indivisible each tortfeasor is liable for the full harm. But the "plaintiff's total recovery, from all tort-

feasors together, is not allowed to exceed his total damages." *Donovan v. Robbins*, 752 F.2d 1170, 1179 (7th Cir. 1984); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971). So "once the plaintiff has been fully compensated for his injuries by one or more of the tortfeasors, he may not thereafter recover any additional compensation from any of the remaining tortfeasors." *Watts v. Laurent*, 774 F.2d 168, 179 (7th Cir. 1985). We are speaking *only* of compensatory damages; punitive damages do not measure the plaintiff's loss, so piling them on top of compensatory damages is permissible.

The present case is one of indivisible injury, most clearly so with regard to K & S and its co-owners. K & S failed to warn the plaintiffs of its suspicions; the owners of K & S caused K & S to fail to warn; and as a result—an indivisible result of the wrongs committed by these three tortfeasors—the plaintiffs were hurt. Thus, in splitting damages inflicted by the group by assessing $120,001 against K & S and $60,001 against Krumhorn, the jury erred, for when tortfeasors inflict an indivisible injury each is liable for the full amount (although the plaintiff cannot collect from both together more than that amount). The jury was led to commit this error by the judge's action—to which the defendants did not object, however, and of which they therefore cannot now complain—in asking it to assess compensatory damages separately against separate defendants. In the case of a single injury the jury should be asked to determine the amount of the plaintiff's loss, which then becomes a joint and several liability of the defendants who inflicted it. *Watts v. Laurent*, *supra*, 774 F.2d at 175-81; *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1146 (7th Cir. 1985); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1387 (7th Cir. 1984). Only punitive damages should be assessed separately.

We could decide that the highest assessment of compensatory damages against any of the jointly liable defendants placed a ceiling on the recovery of compensatory damages, and hence that the plaintiffs could recover only

$120,001 from the K & S group of defendants. Authority for proceeding so is discussed in Prosser and Keeton on the Law of Torts, *supra*, § 47, at p. 329; and *Watts v. Laurent*, *supra*, 774 F.2d at 180, looks in the same direction. But even if, rather than do this, we suppose that the jury found that the K & S group inflicted $180,002 in harm on the plaintiffs ($120,001 + $60,001), this cannot save the judgment. The plaintiffs had already collected $350,000 from Schiller on account of the identical harm. They do not argue that any part of the settlement with him represented punitive rather than compensatory damages. The plaintiffs were fortunate enough to have been able to obtain from one of the joint tortfeasors an amount greater than their actual harm as authoritatively fixed by a valid jury verdict, and they are therefore barred from collecting the verdict itself. "[T]he verdict rendered must be considered as the full amount of damages suffered by the plaintiff. Furthermore, it is the court's duty . . . to credit the judgment by any settlements." *In re Jones*, 804 F.2d 1133, 1143 (10th Cir. 1986) (citation omitted); see also *Royster Co. v. Union Carbide Corp.*, 737 F.2d 941, 950 (11th Cir. 1984); *Sumitomo Bank of California v. Product Promotions, Inc.*, 717 F.2d 215, 219 (9th Cir. 1983).

This discussion flags another question, the correct answer to which will require us to set aside the entire damages award except the award of punitive damages against Serhant.

Serhant was the primary wrongdoer and his entire course of wrongful conduct was placed before the jury, which decided that the total injury inflicted by that conduct on the plaintiffs justified a recovery substantially smaller than what they had already collected from the settling defendants. Indeed, after the punitive damages assessed against Serhant are subtracted, the total damage award was only $3.1 million, compared to more than $8 million awarded against the settling defendants, no part of which is plausibly viewed as an award of punitive damages since no defendant except Serhant was guilty either of an ac-

tual fraud or of some other form of intentional or otherwise aggravated wrongdoing that might justify punitive damages. Having been more than compensated by the settlements, the plaintiffs were entitled to no more at trial, except the portion of the verdict that represents punishment rather than compensation. Realistically, since the jury assessed compensatory damages separately against each defendant, it is possible that the more defendants there had been the more damages would have been assessed. But a party has no right to an improper method of submitting damage issues to a jury. Nor is it very likely, in view of the jury's skepticism about the plaintiffs' damage claims, that adding the Chicago Mercantile Exchange as a defendant would have led the jury to award aggregate damages greater than the settlements.

The last issue is the liability of the First Bank of Schaumburg. Its then president, Weaver, urged a man named Baranski to borrow money from the bank to invest in Serhant's scheme, as Weaver had done (losing, we were told at argument, $1 million of his own money when the scheme collapsed). Weaver also helped put the loans through. Baranski lost the principal of the loans when the Hedge-Spread Program foundered, but he still had to pay the loans back, and he seeks to recover the principal from the bank on the theory that the bank empowered Weaver to suck Baranski into Serhant's whirlpool.

The parties agree that the bank is liable, if at all, only if Weaver knew that Serhant was engaged in fraud. If so, it can be argued that by holding Weaver out to the world as authorized to make loans the bank facilitated his fraud, however unwittingly, and is liable for the consequences. But there is no evidence that Weaver knew of the fraud. So far as appears he was one more sucker, who, dazzled by Serhant's apparent investment genius, saw an opportunity both to build goodwill among the bank's customers and to increase the bank's loan portfolio by encouraging those customers to invest in the Hedge-Spread Program. Although Baranski received a commission from Serhant, this is no evidence that he

knew Serhant was a crook; his own loss of $1 million is some evidence he did not. Baranski conjectures that Weaver promoted the Hedge-Spread Program in an effort to obtain funds that would be used to cover Weaver's own trading losses, but there is no evidence, direct or circumstantial, of any such motive.

Finally, Baranski argues that he was prevented from completing discovery before the judge acted on the bank's motion for summary judgment. In fact Baranski conducted extensive, though wholly fruitless, discovery. All he failed to do was depose Weaver. There was a freeze on discovery for a time but there were many months during which Baranski could have depos[illegible] Weaver but made no effort do so—made no effort even to obtain a copy of the deposition that Weaver had given in another case arising out of Serhant's fraud. The district court was entitled to conclude that Baranski was stalling around with no serious intention of obtaining evidence that Weaver knew of Serhant's fraud.

This completes our discussion. There are some issues we have not discussed but they are either irrelevant on the view we take of the case or too insubstantial to have even colorable merit. To summarize, we affirm the judgment except insofar as it awards compensatory damages to the plaintiffs (that is, the punitive component of the RICO judgment against the Serhant group of defendants stands). We award costs on appeal to the defendants.

AFFIRMED IN PART AND
REVERSED IN PART.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—12-2-87—475

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 8, 1988

Before

HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. ROBERT A. GRANT, Senior Dist. Judge*

ANTHONY J. BOSCO, et al.,

Plaintiffs-Appellants,
Nos. 86-2918, 86-2926, 86-2936, 86-2937 v. 86-3006, 86-3008, 86-3064

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

ROBERT A. SERHANT, et al.

Defendants-Appellees.

Nos. 83 C 7841, 84 C 527, 82 C 5910, 82 C 6611

George N.
Leighton,
Judge.

ORDER

On December 16, 1987, plaintiffs-appellants filed two petitions for rehearing. All of the judges on the original panel have voted to deny the petitions, and they are hereby DENIED.

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* Hon. Robert A. Grant, of the Northern District of Indiana, sitting by designation.

FIFTH AMENDMENT TO UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 17.1(a) of the Supreme Court Rules

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

F.R.C.P. 56(c).

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the

hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

RULE 536 OF THE CHICAGO MERCANTILE EXCHANGE

RECORDS FOR ORDERS AND PERSONAL TRANSACTIONS. -

A. General

At the time of execution, it shall be the duty of every trader and broker to record each trade he makes during the day showing his own name or symbol, the name of the member firm clearing the trade, the date, price, quantity, commodity, contract month, bracket symbol, the opposite broker and opposite clearing member, and, for options, the strike price, "put" or "call" and expiration month. By the end of the trading session or at such earlier times as required by the Exchange, the record of all transactions executed as of that time shall be submitted to the

respective clearing members for which or through which the trader or broker has made trades during the session. Such personal records as well as all orders (whether filled, unfilled or cancelled) shall be retained by each clearing member for at least five years. This includes the document on which a floor broker records a trade for an arbitrage or flashed transaction.

At the beginning of each trading day, each clearing member must ensure that each time clock used on the trading floor by that clearing member is synchronized with the time displayed by the master clock on the Exchange floor.

The President or his representatives may acquire immediate proof of compliance with this Rule.

Violation of this Rule may constitute a major offense.

B. Personal Transactions

At the time of execution, all personal transactions of members must be recorded by the member on sequentially numbered trading cards in the order in which the transactions occurred.

C. House Transactions

1. House Trades Executed by Member Initiating the Orders

At the time of execution, every house order initiated by the member executing the order must be recorded by that member on sequentially numbered trading cards in the order in which the transactions occurred.

2. Other House Trades

At the time of execution, every house order not covered by Paragraph C.1. above, must be in writing and shall be dated and time-stamped when received on the floor (or, if initiated on the floor, upon transmission for execution) and when returned or, in the case of an arbitrage or flashed transaction, when confirmed or cancelled.

D. Member Trading for Another Member on Trading Floor or for Account Controlled by Such Other Member

1. Trades for Personal Account of Another Member

At the time of execution, every order, which is not reduced to writing, that a member receives from another member who is present on the trading floor must be recorded. The member

executing the order must record the time of execution to the nearest minute on the trading care or other document used to record the trade.

Every written order that is initiated by a member for his own account while on the Exchange floor must be dated and time-stamped upon transmission for execution, and when returned or, in the case of an arbitrage or a flashed transaction, when confirmed or cancelled.

2. Trades for Account Controlled by Another Member

Every order for a controlled account initiated by a member while on the trading floor must be in writing, with the customer's designation indicated. Each such order shall be dated and time-stamped upon transmission

for execution and when returned or, in the case of an arbitrage or flashed transaction, when confirmed or cancelled.

E. Customers' Orders

At the time of execution, every order received from a customer must be in writing, with the customer's designation indicated. Each such order shall be dated and time-stamped when received and when returned or, in the case of an arbitrage or flashed transaction, when confirmed or cancelled.

SECTION 5(a)(8) OF THE COMMODITY EXCHANGE ACT

§78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange -

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404, Title I, §10, 48 Stat. 891.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 82 C 6611

DAVID BARANSKI, et al.,

Plaintiffs,

v.

ROBERT B. SERHANT, et al.,

Defendants.

DISTRICT COURT MINUTE
ORDER OF FEBRUARY 7, 1986

ORDERED THAT the CME's motion for summary judgment against the Baranski plaintiffs is granted for the reasons stated herein and for the further reasons set forth in this court's memorandum opinion dated December 18, 1985 in support of its order granting the CME's motion for summary judgment in the class case.

Judge George N. Leighton

DATE FILED: February 7, 1986

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VACCARIELLO, et al.,	)	
	)	
Plaintiffs,	)	
	)	Docket
v.	)	No. 82 C 5910
	)	
FINANCIAL PARTNERS BROKERAGE, LTD., et al.	)	
	)	
Defendants.	)	
BOSCO, et al.,	)	
	)	
Plaintiffs,	)	
	)	Docket
v.	)	No. 83 C 7841
	)	
SERHANT, et al.,	)	
	)	
Defendants.	)	
PASSARELLA, et al.,	)	Docket
	)	No. 84 C 0527
Plaintiffs,	)	
	)	Before the Hon.
v.	)	George N.
	)	Leighton, U.S.
SERHANT, et al.,	)	District Judge
	)	
Defendants.	)	

DISTRICT COURT MINUTE
ORDER OF DECEMBER 18, 1985

For the reasons stated in the memorandum filed herewith, defendant Chicago Mercantile Exchange's motion for summary judgment is granted. Based on the ruling this Court made from the bench on September 20, 1985, disposition of this motion is entered of record nunc pro tunc as of September 20, 1985.

Judge George N. Leighton

DATE FILED: December 18, 1985

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VACCARIELLO, et al.,	)	
	)	
Plaintiffs,	)	
	)	Docket
v.	)	No. 82 C 5910
	)	
FINANCIAL PARTNERS BROKERAGE, LTD., et al.	)	
	)	
Defendants.	)	
BOSCO, et al.,	)	
	)	
Plaintiffs,	)	
	)	Docket
v.	)	No. 83 C 7841
	)	
SERHANT, et al.,	)	
	)	
Defendants.	)	
PASSARELLA, et al.,	)	Docket
	)	No. 84 C 0527
Plaintiffs,	)	
	)	Before the Hon.
v.	)	George N.
	)	Leighton, U.S.
SERHANT, et al.,	)	District Judge
	)	
Defendants.	)	

District Court
Opinion of December 18, 1985
(nunc pro tunc September 20, 1985)

These civil actions arise out of an alleged commodities fraud scheme said to have been masterminded by Robert B. Serhant and run through his companies, Financial Partners, Ltd. and Financial Partners Brokerage, Ltd. (hereinafter collectively referred to as "FPB"). The plaintiffs are over 700 individuals and companies who deposited money with Serhant and FPB pursuant to an agreed-upon investment program. One of the defendants, Chicago Mercantile Exchange ("CME" or "Exchange"), moves for summary judgment alleging that there is no genuine issue of material fact as to its knowledge or participation in any wrongful conduct alleged in this case. Therefore, CME contends it is entitled to judgment as a matter of law.

Two types of investment programs offered by Serhant are relevant to these proceedings: (1) a "hedge/spread" program in which approximately 97 percent of investor funds were to be used to purchase United States Treasury Bills ("T-bills"), the remaining 3 percent was to be used to purchase T-bill futures; and (2) a "trading account" program in which all the investor funds were used to purchase T-bill futures. According to plaintiffs' allegations, the money paid by them was never invested in any of these programs; rather, the investor funds were used by Serhant, FPB and their agents for speculative trading on the commodities futures market. Plaintiffs allege that all of the funds obtained from them for investment were fraudulently placed at

risk and ultimately lost. From the record of these proceedings, the court determines that the following are the material facts.

I

Serhant became a member of the CME when he purchased a seat on the Exchange in 1981. He was a lawyer and prior to this time had been a broker with E. F. Hutton. Serhant and FPB engaged in trading on the Exchange through the facilities and personnel of commodities brokerage firms, including K&S Commodities ("K&S"), among others. These firms cleared FPB's transactions on the Exchange.

The allegations concerning the CME relate to its alleged failure to enforce various rules promulgated by the Exchange and the Commodity Futures

Trading Commission ("CFTC") which, according to plaintiffs, permitted Serhant's fraud to remain undetected for a substantial period of time. What is in dispute in this case is CME's knowledge of the alleged rule violations. Relying on deposition testimony and relevant records, CME argues that there is no evidence to show that it was part of Serhant's scheme to defraud, or that it knew its rules were being violated. CME raises arguments as to each of the following instances concerning Serhant's alleged rule violations.

Under CME Rule 536, a customer designation is required on all orders prior to execution. In September, 1981, Serhant had a meeting with representatives of the CME and K&S to

discuss the proper method for designating customers on block orders, that is, orders that are placed on behalf of several customers. The meeting was prompted by a dispute between Serhant and Mary Lou Bukar ("Bukar"), the compliance officer for K&S, as to whether this rule required the placement of each customer's account number on the floor order before it was sent to the pit for execution. Serhant insisted that as long as the account numbers for block trades were identified on a back office order prior to execution of the trade, he had complied with the rule. Bukar, on the other hand, wanted account numbers on the actual order prior to execution. House counsel for CME told the parties that the rule required only a customer

designation on the order prior to execution, and that as long as specific account numbers were on a back office order, the rule requirements were met.

CME contends there is no evidence to show that it was informed by anyone that Serhant was violating this rule. In support of this assertion, it quotes at length from the deposition testimony of Thomas Utrata ("Utrata"), a member of the CME compliance department. He testified that it was unclear from the meeting what kind of clarification Serhant sought from them, but that it "seemed" he wanted some discretion as to account identifications prior to execution. CME was assured by Bukar that K&S would require more from Serhant that the CME rule mandated.

A second CME rule, Rule 442, requires truthful advertising. Those who advertise commodities investment programs can make no promises as to profits, and must indicate the possibility of loss. On September 1, 1981, the Chicago Tribune published an article about Serhant and FPB, based on an interview with Serhant. The article described the programs offered by Serhant and how they worked. CME admits it was aware of the article and that the article was circulated among its departments. However, it insists that the rule does not apply to interviews. Even if the rule did apply, CME argues that nothing in the article would put it on notice as to Serhant's fraud.

According to CME, the program described in the Tribune was sound, as long as Serhant followed it.

A third CME rule, Rule 932, sets requirements for managed accounts. One requirement is that the power of attorney on these accounts be renewed in writing every 12 months. Other sections of this rule set forth minimum equity requirements and mandate continuous supervision of the accounts by the clearing firm. In conducting its biennial compliance audit of K&S in 1981, CME admits it learned that Serhant was account manager for approximately 113 accounts. But it argues that it found no evidence that the powers of attorney were not renewed in a timely manner. As to the margin requirements, CME asserts that the rule requires the

clearing member supervise the accounts and issue margin calls. CME claims there was no evidence uncovered in this audit to show that Serhant was trading undermargined accounts, or that K&S was permitting this practice. According to CME, continuous supervision of managed accounts is required only when the account manager is a non-member of the CME. Thus, since Serhant was a member, the rule was inapplicable.

A fourth CME rule, Rule 931, requires the CME review accounts of commodity representatives and the manner in which they are serviced. A registered commodity representative ("RCR") is a non-member of the Exchange who acts as a sales representative for commodities. Each RCR must be sponsored by a clearing firm. Several of

Serhant's employees, sponsored by K&S, were registered and approved as RCR's by the CME.

CME argues that this rule, too, applies only to non-members. Further, neither Serhant or his companies were clearing members, so CME contends the rule was inapplicable. Although CME admits it gave some Serhant employees RCR status, it claims it did so because it believed they were employees of K&S, the clearing firm. According to CME, these individuals took the required tests and were approved by the CFTC. CME asserts there is no evidence that it knew any of these individuals were violating any rules.

Two other CME rules, Rules 500-501, require members' employees working on the floor of the Exchange be registered

and supervised by CME. For a period of time, Serhant had his own employees working on the floor, taking orders by phone from Serhant and bringing them to the pit for execution. CME asserts that Serhant, as a member, was entitled to have his own employees on the floor of the Exchange and that there is no evidence that these employees failed to register properly, or otherwise violated the rules.

Finally, under Rule 934, the CME is required to investigate and supervise all omnibus accounts, that is, accounts in the name of an individual that are used for placing and clearing trades of customers of the account holder. CME insists Serhant had no omnibus account. It contends there is no evidence to show that it should have known that investor

funds were in Serhant's personal account, thus it had no duty to investigate or supervise this account.

As to its legal arguments, CME contends first that there is no private right of action under the Commodity Exchange Act, ("CEA"), 7 U.S.C. §5(a)8 for an exchange's failure to enforce rules that do not relate to price manipulation; nor for the failure to promulgate a rule. Further, it contends that even if the court were to find a private right of action exists, it cannot be liable without evidence of bad faith. It claims that there is no evidence of its knowledge of Serhant's scheme, much less any ulterior motive on its behalf.

Next, CME asserts there is no private right of action under the CEA for aiding and abetting. It claims once again that even if the court finds a private right of action exists, there is no evidence of its actual knowledge or intentional participation in the scheme. According to CME, §13c(a) requires willfulness; mere recklessness is not sufficient. It insists there is no evidence it knew its rules were being violated or that the violations were in connection with Serhant's scheme.

In regard to the conspiracy claim, CME contends there is no evidence it knew of a conspiracy, failed to enforce any of its rules, or conspired with any defendant. Even if there were a single plan, CME argues plaintiffs have not alleged or shown that CME knew of its

nature and general scope. It claims there is no evidence of an agreement between CME and any defendant. Because it did not conspire with Serhant, CME argues it cannot be liable to any investor.

Finally, as to the claim under the Racketeer Influenced and Corrupt Organizations Act, ("RICO"), 18 U.S.C. §1962(c), CME argues that there is no evidence that it had the requisite fraudulent intent or participated in a scheme to defraud plaintiffs. It asserts it was not in any way associated with FPB, the racketeering enterprise, and did not participate in its affairs.

Plaintiffs, on the other hand, claim CME knew its rules were being violated by Serhant, K&S and others. In support of their motion in opposition,

they attach deposition testimony, as well as relevant statutory and documentary exhibits. They argue that the following incidents raise a genuine issue of fact as to CME's knowledge.

First, plaintiffs contend that CME rules require customer account numbers on the order prior to execution, not merely a customer designation. As to the September, 1981 meeting, they attach deposition excerpts from Utrata, where he testified that Serhant wanted to keep some discretion as to account designations. According to plaintiffs, this evidence demonstrates that the CME knew Serhant was illegally allocating trades.

Further, plaintiffs contend CME knew Serhant was executing block orders in violation of its rules. In support

of this contention, they relate the following incident. Ira Brill ("Brill") was a CME member and floor broker who at one time filled Serhant's orders in the T-bill pit. In 1981 Brill was cited for violations of CME rules for trading against a customer's order. The order involved a Serhant block order to purchase T-bill contracts. CME learned of these rule violations by reviewing a computerized daily list of trades. Floor orders and documents were requested from the parties involved, as well as tape recordings from the phone line that was used by Serhant to contact the floor of the Exchange. The phone transcripts showed no customer designation was made by Serhant when he placed the order. The purchase was allocated by Serhant to 12 different

accounts. Both the Compliance and Floor Practices Committees of the CME reviewed the phone transcripts. According to plaintiffs, this incident shows CME knew Serhant was executing block orders in violation of the rules.

As to the Tribune article, plaintiffs insist the article be construed as a formal solicitation of business and thus an advertisement under CME rules. They contend individuals at CME saw the article and knew it contained illegal promises because it was contradictory to the risk disclosure statement provided to customers pursuant to CME rules. Thus, they assert the CME was fully aware of the fraud when the article was published.

Plaintiffs also claim CME knew Serhant was managing substantially all of this customers' accounts, yet did not enforce its rules requiring account designations prior to the execution of orders. As to the continuous supervision requirement, they point to deposition testimony from a CME official that the CME did not oversee members' sales activities.

In regard to the rules regulating RCRs, plaintiffs assert several CME employees were registered with the CME, thus it had a duty to review these accounts. Even if it had no actual control over these employees, plaintiffs argue it did have control over Serhant, but failed to exercise it.

In addition, plaintiffs maintain Serhant had omnibus accounts through which most of plaintiffs' money was traded. They claim that in checking Serhant's membership application, the CME must have discovered Serhant had a balance at K&S far in excess of the funds he claimed in his financial statement. Thus, plaintiffs contend the CME knew he was trading customer funds in his own account and had an omnibus account which the CME should have supervised.

Plaintiffs also note the CME's compliance audit of K&S. The report found that there were no procedures to ensure powers of attorney were renewed annually or to monitor equity balances in managed accounts. Thus, they contend CME learned of Serhant's rule violations

through this audit, but did nothing to follow up on what it had uncovered. Plaintiffs further note the CFTC's Rule Enforcement Review of the CME that found a number of deficiencies in its rule enforcement program, including its lack of follow-up on previous rule violations.

Plaintiffs' remaining factual arguments become more tenuous. They note the practice of Sinclair Global Brokerage, a firm Serhant later traded through, of sending margin requests to Serhant, rather than customers, when their equity dropped below minimum requirements. Plaintiffs cite to no evidence to show the CME knew of this practice. When Serhant again changed clearing firms to Saul Stone, according to plaintiffs, Saul Stone discovered

Serhant was illegally allocating trades within one week. Finally, plaintiffs note CME officials' blockage of Serhant's proposal to open his own clearing firm. They cite deposition testimony from the Chairman of the Clearing Committee of the CME, stating his dissatisfaction with Serhant's lack of attention to the details of running a back office. According to plaintiffs, these incidents show that the CME knew or should have known of Serhant's scheme.

As to its legal arguments, plaintiffs contend first that a private right of action exists under the CEA against an exchange for the failure to enforce its rules. They point to this court's ruling of March 16, 1984, which held plaintiffs had stated a cause of

action for CME's failure to enforce position limits on T-bills, where the court concluded that this was tantamount to non-enforcement of its rules.

In regard to the aiding and abetting claim under the CEA, plaintiffs argue an implied right of action exists, as the court previously ruled in this case. They claim the CME wilfully aided and abetted Serhant and FPB in violating the CEA in that it knew Serhant was violating its rules and failed to investigate and stop the violations.

Plaintiffs claim a material issue of fact has been raised as to CME's knowledge that: (1) Serhant was managing numerous customer accounts; (2) he was making illegal promises; and (3) he was illegally allocating trades. They cite the Brill incident, the K&S

audit and CME's decision to stop Serhant's attempt to start his own clearing firm. They claim CME participated in the rule violations by failing to take action against Serhant when it knew rules were being violated. Through this inaction, plaintiffs contend CME participated in conduct constituting aiding and abetting. Alternatively, they claim that mere recklessness is sufficient to satisfy the scienter requirement under the Act.

As to the conspiracy claim, plaintiffs contend that a conspiracy may exist even though some participants may not know all the details of the conspiracy. According to plaintiffs, the CME became part of the scheme by intentionally failing to enforce its rules.

Finally, plaintiffs argue the facts show that CME had the requisite intent to establish a RICO violation; that they "associated with" a racketeering enterprise, arguing indirect association is sufficient. They contend CME participated in the affairs of FPB in that major executives of CME knew of Serhant's fraud.

II

In order to create a question of fact, an adverse party responding to a properly supported motion for summary judgment must set forth specific facts showing that there is a genuine issue for trial. See e.g., Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir.), cert. denied, 104 S. Ct. 392 (1983) (citing Macklin v. Butler, 553 F.2d 525, 528 (7th Cir. 1977); Rule 56(e)

Fed.R.Civ.P.). Once the moving party has demonstrated that the facts on which plaintiffs rely are not susceptible to the interpretation sought to be given them, plaintiffs must show the existence of significant probative evidence supporting the inference urged by them. Weit v. Continental Ill. Nat'l Bank & Trust Co., 467 F. Supp. 197, 208 (N.D. Ill. 1978), aff'd, 641 F.2d 457 (7th Cir. 1981), cert. denied, 455 U.S. 988 (1982). If the court concludes, on the eve of trial, that extensive discovery has produced no evidence to support the complaint, summary judgment must be granted. Weit, 641 F.2d at 467.

Defendant's motion for summary judgment must be granted. First, this circuit has recently held that no private right of action exists under the

CEA for an exchange's failure to enforce its rules that are not related to price manipulation. Cardoza v. Commodity Futures Trading Comm'n, 768 F.2d 1542, 1554 (7th Cir. 1985). Accordingly, plaintiffs have no cause of action under §5a(8) of the CEA. Further, no private cause of action exists under the CEA for the failure to enact a rule. Sam Wong & Son Inc. v. New York Mercantile Exchange, 735 F.2d 653, 668 (2d Cir. 1984).

As to the aiding and abetting claim under the CEA, the court adheres to its earlier ruling in this case that a private right of action exists under §13c(a) of the Act. See Memorandum Opinion, July 23, 1983; Minute Order, December 16, 1983. But in order to show aider and abettor liability, a plaintiff

must demonstrate the defendant had actual knowledge of the scheme, intent to further the scheme, and rendered substantial assistance. Leff v. CIP Corp., 540 F.Supp. 857, 867-68 (S.D. Ohio 1982). Liability under this section cannot be premised on the acts of another, it must be based on the particular defendant's own acts which he carries out for the purpose of assisting another to violate the CEA. Fustok v. Conticommodity Services Inc., 618 F. Supp. 1069, 1072 (S.D.N.Y. 1985).

The court concludes that plaintiffs have not presented sufficient evidence to raise an issue of fact as to CME's knowledge of Serhant's scheme, its intent to further the scheme, or that it rendered substantial assistance. Plaintiffs' suit has been pending over

three years and the parties have engaged in extensive discovery. Yet, for example, plaintiffs rely entirely upon meager excerpts of Utrata's deposition testimony as to what took place at the crucial September, 1981, meeting between Serhant and the CME when, according to the allegations, Serhant told the CME he was violating its rules. This evidence is refuted by defendant's submission of lengthy excerpts of Utrata's deposition that reveal that Utrata and others at the meeting were unclear as to what Serhant wanted from the meeting. According to Utrata's recollection, it "seemed" as if Serhant wanted some discretion as to account designations. Further, according to both Utrata's and Bukar's testimony, at the conclusion of this meeting, the CME was assured that

K&S would demand more stringent requirements from Serhant in regard to customer designations than those demanded by the CME. The evidence submitted by plaintiffs is simply not sufficient to raise a material issue of fact as to the CME's knowledge of Serhant's alleged rule violations.

As to the Brill investigation, the deposition testimony of Robert Duffy, the investigator of the incident, reveals that the investigation gave the CME no reason to believe that its rules were being violated by Serhant. Duffy testified that the phone transcriptions were made from only one line and that the customer designations could have been given over another line. Once

again, the evidence is insufficient to raise an issue of fact as to the CME's knowledge of Serhant's rule violations.

Plaintiffs conspiracy claim fares no better. It is well established that in order to demonstrate the existence of a conspiracy, it must be shown that there was a single plan, the general scope and nature of which was known to the participants. Lenard v. Argento, 669 F.2d 874, 882 (7th Cir.) cert. denied, 464 U.S. 815 (1983). Thus, it follows that one who does not know of the essential nature and scope of the conspiracy cannot be a conspirator. Plaintiffs have come forth with no evidence to show defendant knew of Serhant's scheme.

As to the claim under RICO, without evidence of wrongdoing against a particular defendant, the claim cannot stand. A suit for violation of §1962(c) must be asserted against the one who has engaged in the unlawful conduct, not the enterprise that may have unknowingly been infiltrated by the unlawful conduct. See e.g., Parnes v. Heinold Commodities, 548 F. Supp. 20, 23-24 (N.D. Ill. 1982); Sackheim, Leto, & Friedman, Commodities Litigation and RICO, 34 DePaul L. Rev. 23, 64-65 (1984) (discussing Parnes). Because plaintiffs have presented insufficient evidence to raise a triable issue of fact as to defendant's participation, the RICO claim must fail.

In regard to the remaining alleged rule violations, plaintiffs have not submitted sufficient evidence so as to raise an inference as to defendant's knowledge of Serhant's scheme from the violations, even if the rules in question were found to be applicable. Thus, plaintiffs' only viable claim depended on a conclusion by this court that a private right of action existed against an exchange for the reckless failure to enforce its rules. Because the court has held that no private right of action exists in this situation, these claims must fail.

In summary, plaintiffs have failed to come forth with significant probative evidence supporting the inference of knowledge that they urge. The mere fact that Serhant may have violated CME

rules, without CME's actual knowledge of such violations, is insufficient to impose liability on the Exchange under any of plaintiffs' theories. Accordingly, defendant's motion for summary judgment is granted.

So ordered,

George N. Leighton
United States District Judge

DATED: September 20, 1985

(2)

Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1777

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DAVID BARANSKI, et al.,

Petitioners,

v.

CHICAGO MERCANTILE EXCHANGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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14 pp

QUESTION ACTUALLY PRESENTED FOR REVIEW

Respondent disagrees with petitioners' statement of questions presented for review. Instead, the actual, sole question for review is:

1. Did the Court of Appeals properly find that petitioners were not entitled to further recovery because the damages awarded by the jury resulting from the fraud were less than the settlements received by petitioners?

LIST OF PARTIES

Respondent agrees with petitioners' list of parties.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Chicago Mercantile Exchange ("CME") respectfully asks the Court to deny the petition for certiorari because the Court of Appeals for the Seventh Circuit did not err in holding that petitioners' claims against the CME had to be dismissed, and no question meriting review has been presented.

The CME was granted summary judgment against petitioners by the District Court. Petitioners entered into substantial settlements with some defendants and went to trial against the others. The jury awarded petitioners damages which were less than their settlement recoveries.

On appeal, petitioners argued that summary judgment should not have been granted and their case against CME should go to trial. The Seventh Circuit disagreed, holding that petitioners' recoverable losses, as found by the jury, had been fully satisfied by the settlements.

Petitioners filed a perfunctory six-page petition for rehearing, which was denied, and they did not seek *en banc* rehearing. They raise constitutional claims for the first time in this Court.

STATEMENT OF THE CASE

Petitioners' statement of the case misleads the Court on the very points raised for review. Respondent's restatement of the case will be limited to correcting those defects.

Financial Partners, Ltd. and Financial Partners Brokerage, Ltd. Were Serhant's Alter Egos

Petitioners contend that the Court of Appeals applied in their case findings from the other consolidated cases on Serhant's damage liability. However, petitioners fail to explain to the Court the relationship between Serhant and his two companies, Financial Partners, Ltd. and Financial Partners Brokerage, Ltd., which were defendants in petitioners' case. In fact, it has been undisputed throughout this case that both companies were Serhant's alter egos and that the three "persons" should be treated as one legal entity.

For instance, petitioners' Third Amended Complaint specifically alleged that Financial Partners and Financial Partners Brokerage were Serhant's alter egos. (Third Amended Complaint, ¶7.) In addition, that Complaint specifically alleged that the Financial Partners entities were the corporate means through which Serhant perpetrated the fraud. (*Id.*, ¶¶28-41, 62.)

At trial, the District Court instructed the jury on the relationship between Serhant and the Financial Partners companies as follows:

> I instruct you further that during the times relevant to these lawsuits, Robert Serhant was an agent, an executive of Financial Partners, Ltd., and Financial Partners Brokerage, Ltd.
>
> Any act or omission of Robert Serhant as such agent or executive that was performed by him within the scope of his authority is the act or omission of Financial Partners, Ltd., and Financial Partners Brokerage, Ltd. [Tr. 3622.]

Petitioners' counsel did not object to this instruction.

Perhaps most significantly, petitioners argued to the jury at the close of the trial that Financial Partners and Financial Partners Brokerage were liable for their *entire* losses. (Tr. 3411.) Plainly, petitioners did not believe they needed Serhant as an individual defendant at trial in order to recover *all* their losses caused by Serhant's fraud.

Petitioners Have Not Informed the Court of the Actual Jury Verdicts

Despite the obvious importance of what the jury specifically found in each of the four consolidated cases, petitioners completely omitted from their Statement of the

Case any information relating to the verdicts. What they omit is clearly more important than what they say. In the four consolidated cases, the jury awarded a total of only $551,501 in compensatory damages against Serhant personally, but more than twice that figure against Financial Partners ($1,169,501) and Financial Partners Brokerage ($1,167,503). (*See* Jury Verdicts, R.A. 830.) Thus, of the total of $2,888,505 in damages awarded against Serhant and his companies, only 19% was awarded against Serhant personally.

Petitioners Misrepresent the Seventh Circuit's Holding

Petitioners would have the Court believe that the Court of Appeals took the amount the jury awarded against Serhant personally in the consolidated cases as the maximum amount of damages to which plaintiffs were entitled. That is simply not true. The Court of Appeals' opinion made it clear that it was treating Serhant and the two Financial Partners companies as *one* entity. *See Bosco v. Serhant*, 836 F.2d 271, 274 (7th Cir. 1987), Petn.App. A-4 ("the Serhant group of defendants"), 836 F.2d at 282, Petn.App. A-20 (same). In fact, the Court of Appeals used the total damages assessed against Serhant and his two companies to reach its holding. *See Bosco*, 836 F.2d at 281-282, Petn.App. A-18-19, for the discussion by the Court of Appeals of this point. Petitioners do not claim that this was erroneous.

REASONS FOR NOT GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT DID NOT RELY ON FINDINGS FROM THE OTHER CASES IN HOLDING THAT PETITIONERS HAD NO RIGHT TO FURTHER RECOVERY

Petitioners contend that the Seventh Circuit erred by ruling against them on the basis of jury findings of the damages attributable to Serhant in the other three consolidated cases. Petitioners are wrong because the Seventh Circuit considered Serhant and his two companies to be one entity, just as petitioners had always urged.

Judge Posner explained early in his opinion that this case involved more than one suit, but that he would "suppress that irrelevant detail to simplify the opinion . . ." (*Bosco*, 836 F.2d at 274, Petn.App. A-4.) Judge Posner's opinion, therefore, did not explain any of the procedural differences among the four cases. It is Judge Posner's effort at simplification which petitioners now manipulate to claim error. In fact, there is no error. If Judge Posner had not simplified his discussion and instead applied his reasoning to the specific circumstances of each of the four cases, the decision below would not have changed.

Although petitioners did not proceed against Serhant personally as a defendant, the jury did award them $800,000 against Financial Partners and Financial Partners Brokerage, Serhant's alter egos. Every act done by Serhant in his fraudulent scheme was also an act by either Financial Partners or Financial Partners Brokerage. His entire fraud was, consequently, before the jury for decision in petitioners' case. Under the Court of Appeals' reasoning, $800,000 is the maximum amount of damages recoverable

by petitioners for Serhant's fraud. Since petitioners admit receiving $1,300,000 from other defendants in settlements (Petn. at 5), they have no remaining claim for recovery from any other party.

Petitioners might argue that if Serhant had been a defendant in their case, the jury would have awarded more damages. Any such increase in damages, however, would have been the result of the District Court's error—to which no one at trial, including petitioners, objected—in having the jury assess specific damages against each defendant as to each count, rather than assessing total, indivisible damages on the basis of the defendants' joint and several liability. The Court of Appeals specifically rejected that very argument, and petitioners do not question it here:

> Realistically, since the jury assessed compensatory damages separately against each defendant, it is possible that the more defendants there had been the more damages would have been assessed. But a party has no right to an improper method of submitting damage issues to a jury. [*Bosco*, 836 F.2d at 282, Petn.App. A-19.]

Because petitioners received more in settlements than the amount of losses the jury found they were entitled to recover from the defendants, petitioners have no right to seek further recovery from the Chicago Mercantile Exchange or anyone else.

II.

PETITIONERS FAILED TO ASSERT THEIR CONSTITUTIONAL CLAIMS BELOW

Petitioners now argue that the Court of Appeals unconstitutionally deprived them of their rights to trial and to due process.

However, petitioners failed to raise these constitutional claims in their petition for rehearing below. Instead, petitioners' six-page rehearing petition raised only the procedural point that they had not proceeded against Serhant at trial and therefore should not be bound by the jury's findings as to the other plaintiffs' claims against Serhant. Surely if petitioners believed their constitutional rights were being violated, they would have complained to the appellate panel that supposedly violated them and would have taken the matter to the Court of Appeals *en banc* for relief. They failed to do so. Instead, they burden this Court with claims based on a newly contrived and unfounded separation of Serhant from his alter ego companies which is contrary to the position they have taken throughout this litigation.

III.

THIS CASE WOULD REQUIRE THE COURT TO DECIDE SPECIFIC FACTUAL AND PROCEDURAL ISSUES RATHER THAN GENERAL LEGAL ISSUES OF BROAD IMPORTANCE

Although petitioners dress up their contentions with constitutional language and a plea for supervision of the lower courts, they really ask this Court to review the specific facts, claims, instructions, and verdicts to decide whether their recoverable damages were greater than the settlements they received. Petitioners do not dispute the legal principle applied by Judge Posner and the Court below: plaintiffs' recovery is limited to the damages they incurred from the wrongdoing as found by the jury. They take exception *only* to its application to the facts of this case. To succeed, petitioners would have to persuade this Court that Serhant was legally separable from Financial Partners and Financial Partners Brokerage and that he caused

damage to petitioners for which his companies were not liable.

If the Court were willing to undertake that project, its decision clearly would have no bearing beyond the limits of this particular case. The Court would have to investigate such materials as the complaint, the pretrial order, the trial record, the instructions sought and given, and the verdicts actually rendered by the jury. Of course, this is the type of review designed for the courts of appeals, not this Court, and the Court of Appeals performed precisely that function below. Again, if petitioners actually believed that the appellate panel had substantially departed from "the usual and accepted course of judicial proceedings," why did they fail to seek rehearing *en banc* in the Seventh Circuit rather than burden this Court's docket?

Moreover, review of this case would be hampered by the manner in which the District Court submitted the damage issue to the jury. But petitioners did not object to that method then or now. Thus, the circumstances of this case are truly *sui generis*.

Petitioners point to no conflict between the decision below and any precedent in this Court or any of the other Circuits.[1] They simply ask this Court to sit as another Court of Appeals reviewing the District Court's award of summary judgment to the CME and petitioners' evidence at trial. Thus, their petition does not come within any of the grounds for certiorari jurisdiction.

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[1] Since the Court of Appeals did not rely on facts outside the record of petitioners' case, their many citations at pp. 6-7 of the Petition are irrelevant. None of the cases cited is at all similar to this case.

CONCLUSION

For these reasons, respondent asks the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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